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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CATHEDRAL HILL TOWER CONDOMINIUM ASSOCIATION, Plaintiff, Cross-defendant and Appellant, v. LARISA GARBAR et al., Defendants, Cross-complainants and Appellants.	A124711 (City & County of San Francisco Super. Ct. No. CGC 04-432068)

Respondent Cathedral Hill Tower Condominium Association (the Association) brought this action in 2004 to preclude condominium unit owner Larisa Garbar from installing ceramic tile on her balcony and to compel her to remove unauthorized renovations that violated the Tower's covenants, conditions, and restrictions (CC&Rs). In a cross-complaint, Garbar and her fiancé, Michael Rabichev (defendants) sought to recover damages for excess heat and noise in the unit, allegedly caused by the Association's failure to maintain the Tower's mechanical room above it.[1]

The trial court sustained a demurrer to defendants' cross-complaint without leave to amend and granted the Association summary adjudication as to the balcony tile. After a bench trial, the court found Garbar violated the CC&Rs by failing to obtain approval for her renovations and by constructing a raised ceiling that encroached upon the common area above her unit. The court denied injunctive relief requiring restoration of the unit's original

[1] Defendants were married in 2005.

ceiling, but granted the Association continued use of the common area ceiling space. The court deemed the Association the prevailing party and awarded attorney fees.

Defendants challenge the orders dismissing their cross-complaint and granting summary adjudication, the judgment, and the attorney fee award. The Association also appeals from the judgment, contending the trial court erred in denying injunctive relief.

We reverse the judgment as it relates to the cross-complaint and the prevailing party determination, but otherwise affirm it. We also reverse the attorney fee award.

FACTUAL AND PROCEDURAL BACKGROUND

Cathedral Hill Tower (Tower) is a 25-story, 137-unit building in San Francisco, which was built in 1966 and converted to condominiums in 1982, with the adoption of CC&Rs that incorporate a recorded condominium map.

In May 2001, defendants purchased condominium unit 24D, a one bedroom unit on the Tower's top residential floor.[2] In June 2001, they began extensive renovations, which included installation of hardwood floors throughout the unit and ceramic tile on the balcony, remodeling of the kitchen and bathroom, removal of the unit's original ceiling, and construction of a raised architectural ceiling.

On August 29, 2001, the Association's board of directors (Board) sent Garbar a letter asking her to stop work immediately and submit her renovation plans to the Board for review, as required by the CC&Rs. (Art. III, § 5 ["With respect to any alteration or modification of a unit requiring a building permit from the City of San Francisco, the plans must be first submitted in writing to the Board"].) The Board found Garbar's response insufficient and asked her to provide the floor specifications and "some detail on the elevation of each room[,] as it appears you may be encroaching into the common area." Garbar sent the Board "all the plans . . . that were submitted to [the] City for the building permit . . . ," as well as a sample of the flooring material. She said she had offered to submit her plans to the Board before construction, but real estate agent Darrell Wineman (Wineman) told her "this had not been done in many years." She said she had "made no

[2] Garbar took ownership in her name.

secret about [her] design and building objectives" with property manager Karen Collingwood (Collingwood) and Board vice-president, George Naganuma (Naganuma), and Naganuma had approved the hardwood floors. She said her renovations were "nearly complete."

In response, Naganuma denied approving hardwood floors and stated Collingwood "has no specific information other than that you planned to perform remodeling and you planned to draw the necessary . . . permits . . . ." He told Garbar her plans were "quite incomplete," as she had provided no information regarding the ceiling. Garbar replied that no plans were created for the ceiling and noted: "The construction is almost complete and, upon finalizing of finishes, I hope to move in very soon."

Defendants moved into the unit in late October or November 2001. The parties continued to discuss the encroachment issue, as well as defendants' complaints regarding excess heat and noise in their unit. In 2003, a dispute arose regarding the Association's plan to waterproof the Tower.

The Complaint

In June 2004, the Association filed a complaint against Garbar based on allegations that she violated the CC&Rs: (1) by refusing access to her unit for the waterproofing work, including removal of her balcony tile, and seeking to retile her balcony after the project's completion; and (2) by failing to obtain Board approval for her renovations, installing hardwood floors, and encroaching upon the common area above her unit's original ceiling. The Association sought a declaration of the parties' rights and obligations and injunctions preventing Garbar from interfering with the waterproofing and retiling her balcony, and requiring her to restore the unit to its original condition.

Defendants' Cross-Complaint

In July 2004, defendants filed a cross-complaint for damages, asserting causes of action for nuisance, negligence, invasion of privacy; and intentional infliction of emotional distress (IIED) against the Association and four Board members based on allegations that outdated, inadequately ventilated, and poorly maintained equipment in the mechanical room directly above their unit was producing excess noise and heat.

The trial court sustained a demurrer to the cross-complaint with leave to amend, and defendants filed a first amended cross-complaint. The trial court sustained the Board members' demurrer to all of defendants' causes of action and sustained the Association's demurrer to Rabichev's claims on standing grounds, without leave to amend. This court affirmed the trial court's decision as it applied to the Board members, but reversed the order of dismissal of Rabichev's claims. (*Cathedral Hill Tower Condominium Association v. Garbar et al.* (May 31, 2006, A110379) [nonpub. opn.], 2006 Cal.App. Unpub. LEXIS 4752, pp. 4-5, 9-10, 18-19 (*Cathedral Hill I*).) The court held allegations of Rabichev's ownership were sufficient to survive demurrer on standing grounds, but found his allegations did not satisfy the standard set forth in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 (*Lamden*). (*Cathedral Hill I*, pp. 11-13; see *Lamden*, pp. 260, 265 [adopting a rule of judicial deference to certain Board decisions].) The court directed the trial court to sustain the demurrer to Rabichev's claims, with leave to amend to state a claim against the Association under *Lamden*. (*Cathedral Hill I*, pp. 13, 19.)

Defendants filed a second amended cross-complaint against the Association, reasserting their tort causes of action, adding a cause of action for breach of contract, and asserting additional factual allegations in response to the court's analysis in *Cathedral Hill I*. The Association demurred, contending defendants' allegations did not satisfy *Lamden*, and the trial court sustained the demurrer with leave to amend. Defendants then filed the third amended cross-complaint at issue in this appeal. The Association demurred, contending the acts and omissions alleged were entitled to deference under *Lamden*. On August 15, 2007, the trial court sustained the demurrer without leave to amend and dismissed the cross-complaint.

The Motions for Summary Judgment/Adjudication

The Association and Garbar filed cross-motions for summary judgment, or alternatively, summary adjudication. The trial court denied summary judgment but granted summary adjudication of the Association's first cause of action, permanently enjoining Garbar from retiling her balcony.

Trial

In October 2008, the matter proceeded to a seven-day bench trial on the Association's claims that Garbar violated the CC&Rs by failing to obtain Board approval for her renovations, installing hardwood floors, and encroaching upon the common area above the unit's original sheetrock ceiling. At the outset of trial, Rabichev and the parties stipulated: "[A]ny judgment entered against . . . Garbar in this case may be enforced with equal force and effect against . . . Rabichev without the necessity to amend the judgment or otherwise."

At trial, Garbar maintained that the Board had not consistently enforced the approval requirement, that she had complied with the Board's approval practice as it existed in 2001, and that its enforcement action was selective and arbitrary. She also asserted defenses of waiver, estoppel, and laches, contending the Board was aware of the work in her unit from the outset and that Naganuma approved her hardwood floors. She denied encroaching upon the common area, claiming her unit's boundary extended to a concrete slab separating the unit from the floor above.

In a statement of decision, the trial court concluded: "[T]he area above the original sheetrock ceiling in [Garbar's] Unit is Common Area, and . . . by removing that sheetrock ceiling and extending the interior of the Unit upward . . . [,] [Garbar] has encroached into the Common Area." The trial court also concluded Board approval was required for defendants' renovations and they had failed to obtain it. The trial court rejected defendants' equitable defenses, finding no evidence the Board was aware of work in the common area until after August 2001, and no substantial evidence defendants were misled by the Association.

Balancing the equities, the trial court denied the Association's request for an injunction compelling Garbar to restore the original ceiling, but held: "[T]he Association retains the right to utilize the area that was above the pre-existing sheetrock ceiling for maintenance and repair of anything in that space, as well as the right to otherwise use that space for utility or other installations, and if such work results in the destruction or alteration of the architectural ceiling . . . in the Common Area, then [defendants] are responsible for

any resulting damage." The court did not order removal of the hardwood floors, finding Naganuma approved them.

The trial court entered judgment accordingly, making it binding upon Rabichev and enforceable with the same force and effect as it is on Garbar, and deeming the Association the prevailing party. Defendants and the Association filed timely appeals from the judgment.

Thereafter, the trial court granted the Association's motion for attorney fees and amended the judgment accordingly. Defendants amended their notice of appeal to seek review of the amended judgment.

DISCUSSION

I. The Trial Court Erred in Dismissing the Third Amended Cross-Complaint.[3]

Relying on this court's decision in *Cathedral Hill I*, the trial court held that the allegations of defendants' third amended cross-complaint did not satisfy *Lamden, supra,* 21 Cal.4th 249 and that defendants had not shown an ability to plead facts reflecting the Association's failure to comply with that standard. In reviewing the trial court's decision, "we examine the [cross-]complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory . . . ." (*McCall v. PacifiCare of Cal., Inc.*

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[3] We requested supplemental briefing addressing this court's jurisdiction to review the demurrer decision as to Rabichev, specifically, whether the trial court's August 15, 2007 order dismissing the cross-complaint was a final order from which Rabichev was required to appeal, as he was not named as a defendant in the Association's complaint. We conclude that Rabichev may obtain review of the demurrer decision on appeal from the final judgment. By incorporating into the judgment the stipulation of the parties and Rabichev at trial that any judgment against Garbar was binding and enforceable against Rabichev "with equal force and effect," the trial court effectively amended the complaint to add Rabichev as a defendant to conform to proof. (See *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 527 [no abuse of discretion to allow amendment of complaint to include new plaintiff to conform to proof]; *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761 [amendments to conform to proof should be liberally granted at any stage of the proceedings absent a showing of prejudice].) An amendment to add a defendant to conform to proof is rarely appropriate because a defendant would ordinarily be prejudiced by such an amendment, but there was no prejudice here; Rabichev stipulated to be bound by the judgment and participated in the proceedings throughout the case. For all intents and purposes, he was a defendant from the outset of the action.

(2001) 25 Cal.4th 412, 415.) We " 'give [it] a reasonable interpretation, reading it as a whole and its parts in their context . . . ,' " and assume the truth of all facts properly pleaded, but not "contentions, deductions or conclusions of fact or law." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) When the trial court sustains a demurrer without leave to amend, we also must determine "whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.]" (*Ibid.*)

In this case, these determinations turn primarily on whether the causes of action asserted in the third amended cross-complaint fall within the scope of the rule of judicial deference set forth in *Lamden*, which held: "[W]here a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (21 Cal.4th at p. 265.)

In *Cathedral Hill I*, the court concluded: "With respect to Rabichev's claims against the Association, the [cross-complaint] does not satisfy the *Lamden* standard. It fails to allege adequately the . . . Board's investigation of the problems in the mechanical room was unreasonable, that its actions were taken in bad faith and without regard for the best interests of the community association and its members, or that it abused its discretion by exceeding the scope of its authority under relevant statutes, covenants and restrictions. [Citation.]" (*Cathedral Hill I, supra*, A110379, pp. 12-13.) The court also suggested that the cross-complaint would state a viable cause of action under *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490 (*Frances T.*)," if it alleged a breach of the duty of "a condominium association, like a landlord, . . . to 'exercise due care for the residents' safety in those areas under their control,' " specifically, " 'a failure by the Association to maintain the [mechanical room] in a reasonably safe condition, [and] knowledge on the Board's part of any unreasonable risk of physical injury stemming from its failure to do so.' [Citation.]" (*Cathedral Hill I*, pp. 14-15.)

A. The Allegations at Issue

The third amended cross-complaint includes the following allegations:

Shortly after defendants moved into the unit, they were disturbed by loud noises from the Tower's mechanical room, which is located directly above their bedroom. They also noticed radical temperature differences between their bedroom, which often exceeded 80 degrees, and their living room, which was up to 16 degrees cooler. The excess noise, which was loudest at night and early morning, was caused by vibrations from improperly installed and/or poorly maintained equipment in the mechanical room, water boilers and pumps "nearing the end of their useful lives." The excess heat was caused by inadequate ventilation in the mechanical room, which did not provide "combustion air"—the minimum air required for the equipment to function properly. The lack of ventilation, which could have led to an explosion, presented an unreasonable risk of danger to Tower occupants. The excess heat and noise prevented defendants from sleeping, causing them physical and emotional distress, and related ailments.

From February 2002, to May 2003, defendants sent numerous letters to the Board complaining of the noise and "overwhelming heat." They proposed repairs and provided estimates from contractors, including a proposal from mechanical engineer, Dick Glumac, who later submitted measurements of the noise and heat levels.

By June 2003, defendants still had received no verbal or written response from the Board, which refused to meet or communicate with them to discuss the problem, "ignored" their complaints, and "took no action" to correct the noise problem. The Association had "ignored" the noise complaints of other residents for years.

Glumac complained to the City about the dangerous condition of the mechanical room, and in the summer of 2003, building inspectors red-tagged the mechanical room, requiring repairs to allow proper ventilation. The Association's repairs reduced but did not eliminate the excess heat in unit 24D. In early 2004, Glumac sent the Board measurements showing a continuing noise problem and offered a solution, but the Board "ignored" him and "undertook no significant repairs to solve the excessive noise problem."

Based upon the above allegations, defendants asserted several causes of action that sound in tort. In support of a negligence claim, they alleged: "[The Association] had a duty to act in good faith to insure the mechanical equipment . . . was properly maintained, repaired and/or replaced such that it would not cause annoyance or endanger any resident . . . . In addition, [the Association] had a duty to communicate with [defendants] about the problems they were encountering because of the refusal of the [Association] to make repairs." Defendants alleged the Association breached these duties by ignoring their complaints and evidence of the mechanical room's condition, refusing to make repairs to resolve the issue, and refusing to meet and communicate with them about the defective mechanical room. Further, defendants alleged: "The maintenance of the noisy, dangerous and non Code compliant mechanical room constituted a nuisance in violation of . . . Civil Code section 3479," and that the Association's breach of its duties and the resulting nuisance caused them loss of sleep, emotional distress, and physical trauma. (See Civil Code § 3479 ["Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance"].) Defendants also asserted an Intentional Infliction of Emotional Distress (IIED) claim, alleging the Association knew of the defective mechanical room's impact on them, but refused to make repairs or replace the defective equipment, intending to cause them extreme emotional distress and physical trauma. Finally, defendants asserted a cause of action for invasion of privacy, alleging the Association's refusal to adequately maintain, repair and/or replace antiquated and defective and dangerous mechanical room equipment that produced excess heat and noise violated their right to privacy in their home.

Defendants also asserted a breach of contract cause of action, alleging the Association failed to properly maintain and repair the common area as required by the CC&Rs.

Defendants further alleged that the decision of the Association to ignore defendants' complaints was made in bad faith and not to further the interest of homeowners, as evidenced by: (1) the Board's conduct in targeting defendants for special treatment and

refusing to listen to them when they raised the issue at board meetings, telling Garbar to " 'sit down and shut up' "; and (2) Naganuma's statements to Rabichev that " 'no work would be done . . . in response to [his] complaints[,]' " that the Board did not care about defendants' suffering, and that none of the requested repairs would be made.

The Association argues that the court must disregard allegations "that [it] failed to investigate, refused to repair the ventilation system, ignored [defendants'] complaints, and knowingly maintained a dangerous condition," as these allegations are contradicted by the facts in the attached exhibits and the allegations in earlier versions of the cross-complaint. We find some support for the Association's position, as identified below. The facts in the exhibits and the allegations in the first amended cross-complaint show that, sometime before August 2002, the Association retained an acoustical engineer (Wilson) who recommended repairs to the pumps and that this work was done in March 2003. These assertions contradict allegations in the instant cross-complaint that the Association "ignored" the noise problem, "took no action to make repairs" regarding the noise, and refused to make any repairs to correct the noise problem. We find no conflict, however, between the exhibits and allegations that the Association ignored defendants' complaints about the heat and refused to make repairs to resolve this problem.[4] We view the allegations in the third amended cross-complaint accordingly in determining *Lamden's* application. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384 ["[W]here a party . . . seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings . . . ," the court may take judicial notice of the prior pleadings, disregard inconsistent allegations, and read the prior allegations into the amended complaint if the pleader fails to explain the inconsistency]; *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035,

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[4] Defendants' exhibits acknowledge "the start of work to repair faulty equipment and ventilation" and the installation of a new vent, but they also indicate that the repairs were "for the equipment," not for the heat problem, that the new vent was installed in a remote area of the penthouse, not the mechanical room, and that it did not remedy the excess heat. We also reject the Association's claim that the exhibits and prior allegations contradict instant allegations that the Association knew of a dangerous condition.

1044-1045 ["Facts appearing in exhibits attached to a complaint will . . . be accepted as true and will be given precedence over any contrary allegations in the pleadings"].)

B. *Lamden* Does Not Require Dismissal of the Cross-Complaint.

Defendants' claims arise from the Association's alleged failure to maintain the mechanical room and make necessary repairs. These allegations, liberally construed, may support either a claim that the Association violated a discretionary duty of maintenance and repair under the CC&Rs, which *Lamden* precludes, or claims—to which *Lamden* does not apply—that the Association breached duties otherwise imposed upon it by the common law. (See *Lamden, supra*, 21 Cal.4th at pp. 264, 270 [*Lamden* does not "eviscerat[e] the long-established duty to guard against unreasonable risks to residents' personal safety owed by associations that 'function as a landlord in maintaining the common areas' [citation] . . ."]; *Frances T., supra*, 42 Cal.3d at p. 507 [the business judgment rule "does not abrogate the common law duty which every person owes to others ─ that is, a duty to refrain from conduct that imposes an unreasonable risk of injury on third parties"; it only applies to parties, like shareholders and creditors, to whom the Board owes a fiduciary obligation]; accord, *Lamden*, p. 267.) Defendants' fifth cause of action clearly arises from a contractual duty under the CC&Rs, but their remaining tort causes of action do not specify the source of the duties they assert. Defendants' allegations arguably encompass the Association's common law duties to maintain the common areas in a reasonably safe condition and to refrain from conduct that invades the privacy rights of others and is intended to cause severe emotional distress.[5] We need not decide whether defendants' allegations are sufficient to state causes of action under the common law, for two reasons. First, to the extent defendants are required to specifically allege a breach of particular common law duties, leave to amend their cross-complaint to add such allegations is appropriate. Second, the cross-complaint includes specific facts supporting an allegation that the Board acted in bad

[5] We confine our analysis to whether *Lamden* bars defendants' causes of action; we do not consider whether their allegations otherwise satisfy the elements of these claims.

faith and not to further the interests of Tower residents. That alone is sufficient to satisfy *Lamden* as to all causes of action at the pleadings stage.[6]

II. The Association's Motion for Summary Adjudication

On appeal from the judgment, defendants also contend the trial court erred in granting summary adjudication of the Association's first cause of action for permanent injunctive relief prohibiting the re-installation of tile on their balcony.[7]

A. Standard of Review

" ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) We determine independently the construction and effect of facts presented below as a matter of law. (See *Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355-356.) Summary judgment is proper if the materials submitted show there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) As the moving plaintiff, the Association was required to show each element of the cause of action has been proved, and that there is no defense thereto. (*Aguilar*, at p. 850.) In deciding whether the Association met its burden, we liberally construe the evidence and accept as true Garbar's evidence and the reasonable inferences that can be drawn from it. (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385; *Yanowitz*, at p. 1037.) We must reverse if the evidence would allow a reasonable trier of fact to find any material fact in Garbar's favor in accordance with the applicable standard of proof; we must affirm, however, if the

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6 In light of our conclusions in this regard, we need not address defendants' contention that the Association has the burden of pleading *Lamden*.

7 "[A]n order . . . granting summary adjudication of certain claims . . . is generally reviewable on appeal from the final judgment in the action." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 128.) Although the trial court granted summary adjudication only against Garbar, we conclude that Rabichev may obtain appellate review of the trial court's order on appeal from the judgment, which is "binding upon [him], and enforceable with the same force and effect as it is on . . . Garbar."

Association's evidence would require a reasonable trier of fact to find all material facts in its favor, more likely than not. (*Aguilar*, *supra*, 25 Cal.4th at pp. 850-851.)

B. Relevant Background

The Association presented evidence of the following facts: The Association is responsible for management of the Tower and is governed by a five-person board of directors. The CC&Rs charge the Association with control and maintenance of the common areas of the Tower (Art. I, § 3, p. 2; Art. IV, § 1, pp. 12-13), and govern the conduct of homeowners there. The Association has the authority "[t]o enforce the applicable provisions of the [CC&Rs,] relative to the management and control of the project. (Art. V., § 7(A), p. 17; Art. I, § 11, p. 3)

The Tower had sustained extensive structural damage over the years due to water intrusion. In 2002, the Board retained architect and engineer Jeff Chen to study the problem and recommend a solution. Chen recommended waterproofing the building as soon as possible, and permanent removal of coatings, tile, and other materials from the balcony surface. In June 2003, homeowners approved a $3 million waterproofing project at the Board's urging. The Board retained general contractor Everest Waterproofing and Restoration (Everest) to perform the work, using a waterproofing membrane manufactured by Tremco, and the work began in August 2003.

A dispute arose with Garbar, who sought to retile her balcony after the project's completion. Chen and Everest's president, Keith Goldstein, explained that no tile or other " 'overburden' " could be placed over the waterproofing membrane and provided letters from Tremco and Everest stating the warranties would be voided if such material was installed.[8] The Association also presented evidence from Chen that retiling the balcony could compromise the waterproofing.

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[8] Tremco's letter states: ". . . Tremco warranties waterproofing membranes and completed deck coating systems. These warranties are tied to initial specifications, surface prep, correct installation and inspections. Tremco will not warranty systems that have been altered or compromised by alternate or additional systems on top of finished warranted deck coatings. Tremco will not be held responsible for any installation consequences of other

In addition to this evidence, the Association contended the CC&Rs prohibited balcony tile and that *Lamden* precluded Garbar from objecting to the Board's method of fulfilling its maintenance responsibilities.

Seeking to raise a material issue of fact regarding the Association's claim that retiling would void the warranties, Garbar presented evidence: (1) that the Tremco waterproofing membrane is compatible with tile; and (2) that placement of tile on the balcony surface would not cause leaks or other harm, and, in fact, would provide additional protection. Rabichev, a licensed architect and civil engineer, submitted a declaration in which he stated that Tremco's letter "did not mention anything about tile," and characterized it as "a generic non-specific letter of abstract requirement to conform to manufacture[r] specifications." He construed Tremco's letter to mean "their warranty was only valid when Tremco's specific system of installation was provided . . . ." Rabichev also stated that Chen and Goldstein admitted tile installation was feasible and that they had installed tile over waterproofing, but that Tremco would not warrant the product with tile, and the Board was unwilling to consider other alternatives.[9]

In granting the Association's motion, the trial court cited Article III, section 2.E of the CC&Rs (section 2.E), "which addresses restrictions on the use of balconies." In addition, the trial court found the Association's request to enjoin Garbar from retiling her balcony "is reasonable under [*Lamden*]" and Article II, section 2.F of the CC&Rs, "as related to the need to maintain the building . . . ."

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manufacturer's materials installed on top of deck coatings after the warranties have been issued."

Everest's letter indicates it would not warranty the deck coating system "if [it] is altered by the addition of other systems or materials, such as tile, placed on top of the deck coating." It also notes: "The system manufacturer has also stated that any additional materials placed on the deck coating will void the manufacturer warranty."

9 We do not consider Rabichev's statements that most manufacturers warrant tile installation over waterproofing and Tremco's representatives assured him it was okay, as the trial court sustained the Association's objections to this evidence.

B. Analysis

As explained more fully below, we agree with the trial court that section 2.E gives the Board discretion to restrict the installation of balcony tile and that *Lamden* insulates this discretionary decision from judicial scrutiny.

1. The CC&Rs Give the Board Discretion to Deny Balcony Tiling.

Where, as here, the trial court's interpretation of the CC&Rs does not turn on the credibility of extrinsic evidence, we construe them independently according to general principles of contract interpretation. (*Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 817.) Thus, "[t]he language of the CC&R's governs if it is clear and explicit, and we interpret the words in their ordinary and popular sense unless a contrary intent is shown. [Citations.] The parties' intent is to be ascertained from the writing alone if possible. [Citation.] If an instrument is capable of two different reasonable interpretations, the instrument is ambiguous. [Citation.] In that instance, we interpret the CC&Rs to make them lawful, operative, definite, reasonable and capable of being carried into effect, and must avoid an interpretation that would make them harsh, unjust or inequitable. [Citations.]" (*Id.* at pp. 817-818, fns. omitted; see Civ. Code, § 1638.) Applying these principles, we conclude the CC&Rs give the Board discretion to preclude Garbar from retiling her balcony.

Section 2.E is entitled "Balcony Restrictions" and states: "No portion of any balcony shall be enclosed in any manner whatsoever, *nor shall any* structure, shade, screen, awning, hanging plants or *other devices be attached thereto*, without the written consent of the Board. Further, nothing shall be placed, stored or maintained on any balcony (such as bicycles and barbeques) other than furniture specifically designed for balcony use and which may include potted plants . . . ." This language reflects an intention to give the Board discretion to decide what items could be attached to the balcony surfaces. Patently, ceramic tile is attached to the balcony surface.

Defendants' challenge to the trial court's interpretation of this provision lacks merit. First, they maintain this section cannot be reasonably interpreted "to refer to the balcony surface, let alone to prohibit tiling," as "[t]iling does not 'enclose,' . . . [and] is not a 'device

. . . attached' to . . . the balcony . . . ." They fail to acknowledge the language of this section indicating "[n]o portion of any balcony shall be enclosed . . . ," and provide no discussion or definition of the terms "enclosed" and "device" to support their contention. (See *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121.)

Second, they maintain that if the CC&Rs intended to preclude balcony tile, "its framers could have said so clearly, specifically and unmistakably, as they did in referring to bicycles and barbeques, or as they did in Article III, section 2B, . . . [which] address[es] . . . floor coverings." (See *id.* ["installation of . . . ceramic tile . . . shall be prohibited except in the entryways"].) Reviewing in context the paragraphs regarding "maintenance of residential units," however, we do not agree failing to specifically mention ceramic tile evidences an intent not to include it within the balcony restrictions.

Finally, defendants argue: "[T]he CCRs expressly contemplate that owners can tile their floors, consistent with the statutory scheme governing condominium developments in 1982." Effectively, they argue that, since the CC&Rs track the language of former Civil Code section 1353, subdivision (d), which gave condominium owners the exclusive right to refinish and decorate the inner surfaces of floors, the CC&Rs also must provide such a right. (*Id.*, as enacted at 1963 Stats., ch. 860, § 3, p. 2092.) They fail to note language in Article III, section 2, however, specifically making this right conditional (Art. III, § 2, 1st para.), and subject to section 2.E.[10]

In sum, the trial court correctly held that section 2.E afforded the Board discretion to decide whether to allow retiling upon completion of waterproofing.

2. *Lamden* Requires Deference to the Board's Discretionary Decision.

The decision whether to permit balcony tile after waterproofing is the exact type of discretionary economic decision at issue in *Lamden*, and the undisputed facts show that this decision satisfies the *Lamden* criteria, specifically, that the Board conducted a reasonable

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[10] As we conclude section 2.E provides the Board discretion to preclude balcony tile, we need not address Article II, section 2.F, which simply allows the Association "to enter upon any privately owned subdivision interest as necessary in connection with . . . maintenance or emergency repair for the benefit of the Common Area or the owners. . . ."

investigation, followed its experts' recommendations, and acted in good faith for the benefit of the Association and its members to prevent leaks, protect the Tower's structural integrity, and preserve the service and product warranties in precluding defendants from retiling. (See *Lamden, supra*, 21 Cal.4th at p. 265.) Defendants' reliance on facts addressing the waterproofing membrane's compatability with tile is of no moment, and *Lamden* precludes this type of second guessing in any event. Even if the facts on which defendants rely are true, the Board has discretion not to risk harming the waterproofing system and opening the door to a warranty dispute.[11]

Finally, defendants contend the Association did not allege or assert in its summary judgment motion the facts required for injunctive relief, namely, that damages would be inadequate or difficult to estimate, or that relief is necessary to prevent multiple actions. The record demonstrates otherwise.

We therefore affirm the trial court's decision granting the Association's motion for summary adjudication.[12]

III. The Encroachment Issue

Defendants challenge the trial court's findings regarding the unit's boundaries and its conclusion the space above the original ceilings is common area.

A. Relevant Background

The 24th floor is the top residential floor of the Tower and is separated from the mechanical room on the floor above by a concrete slab. As originally constructed, the living

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[11] Defendants contend *Lamden* does not apply because that case addressed the Association's duty to maintain and repair the common area, not part of a unit, which includes the balcony. We do not find this distinction persuasive. *Lamden*'s rule of deference turns upon the discretionary nature of the Board's decision under the CC&Rs, not whether it relates to the common areas.

[12] Relying on their arguments in opposition to the Association's motion for summary adjudication, defendants also argue that the trial court erred in denying Garbar's motion for summary adjudication. To the extent they have not waived this assertion by failing to include the trial court's denial order and to provide authority and analysis regarding this motion demonstrating error, we reject it for the reasons set forth above in affirming the trial court's grant of the Association's motion.

room, dining area, kitchen and bedroom in unit 24D had a flat suspended sheetrock ceiling, identified in the recorded condominium map as "ceiling A." The original ceiling in the foyer and bathroom is identified as "ceiling B." In unit 24D and other 24th floor units, there is a space of approximately 21 to 24 inches between ceiling A and the concrete slab above. The space above ceiling B is larger, as this ceiling is several inches lower than ceiling A.

Defendants removed ceilings A and B. They replaced ceiling A with a sculptural architectural ceiling, which has pockets lower than 8.5 feet, high pockets around 10 feet, and an average height of nine feet in the living room area.[13] They also raised ceiling B by six inches, to an average height of less than nine feet.

The Evidence at Trial

At trial, the parties offered into evidence: original building plans for the Tower, photographs of unit 24D at various stages of construction, and the governing documents, including the CC&Rs.

The CC&Rs define "condominium" as "a separate fee interest in the air space and interior surfaces within a unit, as more particularly described on the Condominium Map." A recorded condominium map (Map) appended to the CC&Rs sets out a typical residential floor plan, which does not show the units' upper boundaries but includes "General Notes" stating: "The entire condominium property, excepting the condominium units, is 'Common Area.' [¶] The boundaries of the condominium units are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof . . . . [¶] The physical boundaries of the condominium unit . . . shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed herein, regardless of settling or lateral movement of the building and regardless of minor variances between boundaries shown hereon and those of the building. . . . [¶] . . . [¶] Condominium unit floor and ceiling elevations, are as shown hereon."[14] On the next page of the Map appears a schedule of unit

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[13] Rabichev could not recall the bedroom ceiling height, but defendants built an elevated platform there that requires a raised ceiling.

[14] This language mirrors that of former section 1353, subdivision (a) of the Civil Code. (See *ibid.*, as enacted, Stats. 1963, ch. 860, § 3, p. 2092, repealed Stats. 1985, ch. 874, § 13.)

elevations, which indicates a floor elevation of 422.60 feet in unit 24D, an elevation of 430.9 feet for ceiling A, and an elevation of 430.1 feet for ceiling B.

General contractor Kevin Kearney testified for the Association and opined that the original sheetrock ceilings provided the unit's upper boundaries, and the area above these ceilings was intended to be common area. He stated, after review of the applicable CC&R provisions and the attached Map, that it was "clearly the intention to be able to utilize the area [above the original ceilings] to run service, possibly for the entire building"—specifically, to allow the Association "to run conduits for either gas, electric, plumbing, HVAC, cable television. Any number of possible future uses." Kearney relied on photographs showing water pipes and heating ventilation ducts in the space above the original ceilings. He also relied on original building plans M-6 and M-7. Plan M-6 shows a space above the ceiling, labeled: "FURRED CLG," and, according to Kearney, plan M-7 states: "RUN ALL PIPE IN FURRED SPACE ABOVE CEILING OF TOP TYPICAL FLOOR." Plan M-6 also provides a 24th floor ceiling height of 8.5 feet.

Kearney's testimony was countered by that of several witnesses called by defendants. Architect Harry Novak testified that the upper boundaries of the 24th floor units extend to the concrete slab above the unit. Novak relied on the Map's definition of the units' boundaries as "the perimeter . . . ceilings," in concluding a unit's structural elements mark its boundaries. Thus, in his view, the unit had two ceilings: the sheetrock ceiling and the concrete slab above it—the latter representing the unit's "perimeter . . . ceiling[]" and upper boundary. He further testified that the elevations schedule referred to the unit's "current head room," and not its upper boundaries.

General contractor, John Nunnelee, concurred in Novak's opinion that the concrete slab is the unit's upper boundary. He opined that the term "perimeter" in the Map's boundary definition is an adjective that specifies "what ceiling is being used [as a boundary]." In his view, this term contemplates the structural elements— the concrete slab above the sheetrock ceiling. Nunnelee stated that the sheetrock ceiling was finished

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(See CC&Rs, Art. I, § 20 [unit boundaries "shall be as designated in Section 1353(a) of the Civil Code, shown and defined on the Condominium Map . . ."].)

material, not a durable, permanent structure, and therefore not a boundary. He also rejected the elevations in the schedule as boundaries, noting they do not match the unit's actual measurements.

Testifying as an expert, Rabichev stated the structural perimeter elements define a unit's boundaries. Noting the original plans call for a "furred" ceiling — a lower ceiling below the primary ceiling, he said "[v]irtually every single time" he has been involved in renovating a unit with a false ceiling, it was removed.

The Trial Court's Decision

The trial court determined, after considering the evidence presented by the parties, that the unit's upper boundaries are the original sheetrock ceilings, not the concrete slab, and concluded that the area above these boundaries is common area, upon which defendants had encroached. In support of its findings, the court noted "evidence that the approximately two feet of space above the ceilings on the 24th floor was unique, that is[,] it did not exist in the units on the lower floors," and "portions of the original plans in evidence [which] show that the space above the ceilings on the 24th floor [was] intentionally designed to accommodate the heating and ventilation ducting, as well as other utility piping, wiring, etc." The trial court set the unit's upper boundaries in accordance with the elevations schedule, with ceiling A at 8.3 feet and ceiling B at 7.5 feet; and found the space above these ceilings was common area, "whether located below or above the currently existing ceiling."

B. Analysis

As the trial court admitted extrinsic evidence to aid in interpreting the CC&Rs, we must uphold any reasonable construction supported by substantial evidence. (See *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 636.)[15]

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[15] Defendants contend de novo review applies because there was "no direct evidence of the governing documents' formation, and the lower court's ruling . . . rested only on its analysis and construction of the documents." The statement of decision confirms the court relied on extrinsic evidence, and defendants present no authority to show extrinsic evidence must relate to CC&R formation.

1. The Trial Court Properly Concluded That The Space Above the Original Sheetrock Ceilings in Unit 24D is Common Area.

The Map's boundary definition may reasonably be construed in accordance with the trial court's conclusion setting the interior surfaces of the unit's sheetrock ceilings as its upper boundaries. Defendants argue that in referring to the unit's "perimeter . . . ceilings," the Map identifies the boundaries as the outer, structural elements, but it was not unreasonable for the trial court to conclude this language refers simply to "ceilings," as that term is commonly understood. Lending further credence to this construction is the Map's reference to the elevations schedule in defining the boundaries. The schedule reasonably refers to the height of the sheetrock ceilings and not the concrete slab.

In addition, the court's construction is supported by substantial evidence, namely, Kearney's testimony, photographs of the ceiling space and the original building plans. Evidence the lower floors have no space above ceiling A and only a 9-to-12-inch space above ceiling B also suggests 24th floor units were not intended to include additional space.

Defendants attack Kearney, contending his testimony does not constitute substantial evidence for several reasons, none of which has merit. First, they characterize as "preposterous" testimony that the ceiling space could be used to run conduits, but they fail to provide record support for the ambiguous reasoning supporting their contention. In addition, defendants erroneously contend Kearney admitted the architect would have drafted a reflected ceiling plan to indicate an intent to reserve the ceiling space for future use. Kearney simply agreed: "[It] would be part of the plans, *if one was drawn . . . .*"[16]

Second, defendants argue that Kearney's testimony regarding the intended use of the ceiling space "lacks any substantiality" because he misread the notation on plan M-7, which they contend is an instruction to run a particular pipe ("AL1"), not "all pipe," in the furred

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[16] Defendants also maintain Kearney's testimony is "baseless" and speculative as to the Association's plans to use the ceiling space in the future. We need not decide this question. Kearney offered this testimony to support his opinion that the ceiling space was intended to be reserved for use in the future, as needed. As discussed above, substantial evidence in the record supports his conclusion in this regard; whether the Association currently has viable plans for the use of this space is not determinative.

ceiling space. Kearney's testimony at trial regarding this notation was inconsistent, but his conclusions did not turn on this distinction. Defendants contend, in any event, that plan M-7's notation cannot be construed to refer to the ceiling space above the 24th floor because Kearney admitted the 24th floor was not "typical." Defendants fail to note testimony in which Kearney acknowledged that plan M-6 identifies only floors 3 through 23 as "typical" floors but concluded, nevertheless, that the 24th floor is "the top typical floor" within the meaning of the notation on plan M-7.

Last, defendants identify purported inconsistencies in Kearney's attempt to reconcile the ceiling height indicated in the original plans (8.5 feet) with the elevations schedule. We do not agree that the alleged inconsistencies would preclude a reasonable factfinder from relying on his opinion.[17]

Defendants assert a number of additional arguments in support of their claim of error, which we find equally unavailing. First, they cite "[g]enerally accepted authorities and industry standards" that purportedly construe the CC&R language, "interior surfaces of the perimeter . . . ceiling . . . ," to refer to the structural elements of the building, i.e., the concrete slab above the unit. The language defendants cite from Miller & Starr does not establish the unit's structural elements as its boundaries. Moreover, defendants' reliance upon the text of the Uniform Common Interest Ownership Act (Act) is unpersuasive, as they have not provided authority or competent evidence establishing that the Act constitutes a "generally accepted authorit[y]," reflects the industry standard, or otherwise compels us to alter our conclusion. They simply quote from it, with no analysis of its application here.[18] The question before us, in any case, is whether the trial court's construction of the CC&Rs

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[17] Defendants also contend Kearney's testimony "lacks expertise," "was not grounded in the language of the governing documents" and is not based on evidence of drafter intent. They provide no authority to support these conclusory assertions, and have waived them, in any case, by failing to object in the trial court.

[18] We see no indication defendants cited below the other sources on which they rely, and we do not consider these sources. (*Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131 (*Gonzalez*.)

is reasonable and supported by substantial evidence, not whether there are other reasonable constructions and conflicting evidence.

Defendants also maintain that the unit would violate the California building code if the original ceilings are deemed its upper boundaries, noting the CC&Rs may not be interpreted in a way that renders them unlawful. Specifically, they argue that the Tower is a Type 1 concrete structure, which is required by the building code to have at least a one-hour fire rating. They assert that this requirement presents no problem if the concrete slab is deemed the boundary because "interior non-load bearing partitions within [a] unit" are exempted, but if the original sheetrock ceilings are deemed the boundaries, they would violate this requirement. Defendants fail to submit evidence that the Tower constitutes a Type 1 structure or expert testimony discussing the building code's requirements in these circumstances, which we believe is essential to establish their contentions. Thus, defendants have not provided substantial evidence supporting their contention, and the trial court reasonably rejected it.

In addition, defendants assert a policy argument, contending: "Defining boundaries by easily damaged or modified elements, like wall partitions or 'furred' ceilings makes no sense, as it would allow the 'existing physical boundaries,' . . . to vary from unit to unit and to be moved, modified or removed altogether, thereby introducing uncertainty and inviting boundary disputes . . . ." Defendants fail to recognize that if the existing ceilings' interior surfaces are deemed the boundaries, their exterior surfaces are part of the common area, and are not subject to modification or removal absent Board approval.

Finally, defendants contend it is unreasonable to construe the furred ceiling space as common area, as this would violate Article II, section 2 of the CC&Rs, which states that all owners shall have a "non-exclusive easement of use . . . to . . . the Common Area," since this space "has no possible common access." Defendants do not provide record citations establishing this fact, and we do not find this contention persuasive in any case. Several items specifically identified in the Map as common area have no common access, and there

is no dispute that the concrete slab, which abuts the ceiling space and also has no common access, is common area.[19]

2. The Specific Boundaries Identified by the Trial Court

Although we conclude the trial court reasonably relied upon the elevations schedule in finding the unit's original ceilings mark its upper boundaries, we agree with defendants that the trial court's literal adoption of these elevations as the unit's upper boundaries was unreasonable in light of the evidence in the record. We note at the outset that the Map contemplates variances between the schedule's elevations and the units' actual measurements, and provides that in cases where such variances exist, the unit's physical boundaries control, "rather than the metes and bounds expressed herein." In other words, although the schedule may reasonably be construed to approximate the unit's upper boundaries, it is unreasonable to set the boundaries in accordance with these elevations to the extent they conflict with the actual height of the unit's original ceilings.

At oral argument, defendants maintained, and the Association conceded, that the only evidence in the record of the actual height of ceiling A, as originally constructed, is Rabichev's testimony that he measured this ceiling at 8 feet, 7 inches. As the sole evidence of the actual height of ceiling A conflicts with "the metes and bounds" expressed in the elevations schedule for this ceiling (8 feet, 3.6 inches), the physical boundaries control. The trial court therefore erred in setting the upper boundary of the portion of the unit bordered by ceiling A in accordance with the elevations schedule, rather than this ceiling's actual height. As the record unambiguously establishes the actual height of ceiling A, and therefore the upper boundary of this portion of the unit, at 8 feet, 7 inches, we modify the judgment accordingly, and need not remand the matter to the trial court for further proceedings on this issue.

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[19] We also reject defendants' contention the ceiling space is not common area because it is not "necessary or convenient to the existence, maintenance, and/or safety of the project as a whole . . . ." They do not provide record citations or analysis supporting this conclusion, and Kearney's testimony reasonably supports a contrary finding. (See *Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633.)

Unlike ceiling A, the parties are unable to cite any evidence in the record that ceiling B was originally higher than the elevation listed in the schedule for that ceiling, 7.5 feet. As defendants have not demonstrated that the actual height of ceiling B, as originally constructed, conflicts with the elevation listed for this ceiling in the schedule, they have failed to demonstrate that the trial court erred in setting the upper boundary of the portion of the unit bordered by ceiling B at 7.5 feet.

C. Defendants' Equitable Defenses

1. Laches

Defendants challenge the trial court's rejection of their laches defense, finding no substantial evidence the Board was aware of the ceiling work and encroachment until August 28, 2001. They contend Naganuma's and Collingwood's knowledge and involvement in their renovation must be attributed to the Association, but provide no analysis or record citations of what Naganuma and Collingwood knew and when they knew it. Lacking citations, this argument fails on the merits, as defendants have not demonstrated error.[20]

2. Arbitrary and Discriminatory Enforcement of the CC&Rs

Defendants contend the trial court committed reversible error in failing to make a finding with regard to its contention that the Association selectively enforced the CC&Rs. (See *Lamden*, *supra*, 21 Cal.4th at pp. 265-266 [association must show that exercise of its enforcement power is fair and nondiscriminatory, that it followed its own standards and procedures before pursuing a remedy, that its procedures are fair and reasonable, and that its decision was in good faith, reasonable, and not arbitrary and capricious].) Citing Code of Civil Procedure section 632, defendants argue that the trial court is required to explain the legal and factual basis of its decision on all principal controverted issues. The trial court's duty in this regard arises, however, only upon the filing of a written request specifying the

[20] In their reply brief, defendants rely on the trial court's findings "acknowledg[ing] Naganuma's visits to 24D during construction and his knowledge of the ceiling renovation . . . ." Defendants have waived this contention by failing to assert it in their opening brief. (*Baugh v. Garl* (2006) 137 Cal.App. 4th 737, 746.)

controverted issues on which a statement of decision is requested. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 558; see Code Civ. Proc., § 632.) The record does not include such a request here. In any event, such an omission constitutes reversible error only if it is prejudicial. When the missing finding is reasonably implicit in other findings or would necessarily have been adverse to the appellant, the omission is harmless. (*McAdams v. McElroy* (1976) 62 Cal.App.3d 985 (*McAdams*); *Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1450 (*Rojas*).) In deciding the issues in this case, the trial court necessarily found the Association was entitled to enforce its CC&Rs, and the record shows the court's finding on this point would have been adverse to defendants in any case.

Defendants argue that failure to make a finding on a principal controverted issue is reversible error if substantial evidence supports a finding in their favor and such a finding would prohibit the judgment. We do not read their authority so broadly. Compliance with Code of Civil Procedure section 632 precludes us from implying a finding in favor of the prevailing party from the judgment itself (Code Civ. Proc., § 634); it does not prevent us from implying findings that necessarily follow from other findings. (*McAdams*, *supra*, 62 Cal.App.3d at p. 985; *Rojas*, *supra*, 50 Cal.App.4th at p. 1450.)

Defendants appear to contend substantial evidence does not support an implied finding of fair and nondiscriminatory enforcement. They point only to evidence that supports their position, however, and have waived this argument. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) We observe, in any case, that they have not shown another instance in which the Board failed to enforce the CC&Rs under the same circumstances as these, specifically, when owners: (1) removed ceiling A and extended the living room area and bedroom upward by at least 1.5 feet; and (2) engaged in other CC&R violations that required litigation.[21] In instances of a single, minor violation, enforcement may not be worth the time and expense of litigation; when an owner's encroachment is extensive and

[21] We do not consider the arguments and extensive evidentiary citations defendants include for the first time in their reply brief.

litigation otherwise becomes necessary, it is not unreasonable to enforce the unit's boundaries in the same litigation.[22]

In light of our conclusion that substantial evidence supports the trial court's finding the space above the unit's original ceilings is common area, we need not address defendants' challenge to its finding they failed to submit their plans for approval, and its rejection of their related waiver and estoppel defenses.

IV. The Relief Ordered by the Trial Court

Both sides challenge the relief ordered by the trial court, with defendants contending it went too far, and the Association contending it did not go far enough. We review the trial court's decision denying injunctive relief, as well as the equitable relief it fashioned, for abuse of discretion. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771 (*Hirshfield*); *Ekstrom, supra*, 168 Cal.App.4th at p. 1121.) We resolve all evidentiary conflicts in favor of the judgment and determine whether the decision " ' "falls within the permissible range of options set by the legal criteria." ' " (*Hirshfield*, at p. 771.)

A. Balancing the Equities

Once the court determines a trespass has occurred, the court conducts an equitable balancing to determine whether to enjoin the trespass or whether to award damages instead. (*Hirshfield*, *supra*, 91 Cal.App.4th at pp. 758-759.) "Overarching the analysis is the principle that since the defendant is the trespasser, he or she is the wrongdoer; therefore, 'doubtful cases should be decided in favor of the plaintiff.' [Citation.]" (*Id.* at p. 759.) Nonetheless, " 'a court has discretion to . . . deny removal of an encroachment if it was innocently made and does not irreparably injure the plaintiff, and where the cost of removal would greatly exceed the inconvenience to the plaintiff by its continuance.' " (*Id*. at p. 761, italics omitted.) When the trial court properly denies an injunction requiring removal of an encroachment, "it has the power in equity to grant the encroacher affirmative relief by fashioning an interest to protect the encroacher's use of the disputed land." (*Id.* at p. 754.)

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[22] Defendants rely on evidence that other owners raised ceiling B, but there is evidence that this is a "more minor violation" and "very minute" compared to raising ceiling A.

B. The Association's Cross-Appeal

The Association contends the trial court erred in allowing defendants to retain remodeled ceilings that encroach upon the common area instead of requiring restoration of the original ceilings, for two reasons. We now turn to these arguments.

1. The Trial Court's Findings Do Not Establish Willful Encroachment.

First, the Association contends the trial court's findings of willfulness precluded it from balancing the equities. (See *Hirshfield, supra*, 91 Cal.App.4th at p. 759 [encroachment must not be willful or negligent, and the court should consider the parties' conduct to decide who is responsible for the dispute].)[23] Although the trial court did not specifically find willfulness, the Association argues the findings in the statement of decision support this conclusion.

In evaluating this contention, "we must interpret the judgment so as to make it valid, and construe it with reference to the law regulating the rights of the parties. [Citation.]" (*Hirshfield, supra*, 91 Cal.App.4th at p. 767; see *People v. McCue* (1907) 150 Cal. 195, 198-199 [if findings of fact are reasonably susceptible to a construction that supports the judgment, they must receive that construction rather than one that does not]; *Green v. Antoine* (1955) 133 Cal.App.2d 269, 275 [liberal construction of findings to support the judgment].) Thus, on this record, we begin our analysis with the presumption that the trial court's findings do not establish a willful encroachment that precludes balancing the hardships. The Association has the burden to overcome this presumption. (*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 564 (*Denham*).) Moreover, to the extent the trial court's findings are ambiguous, we must construe them in favor of defendants, as the Association did not object to the proposed statement of decision seeking

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[23] In *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 562-563 (*Christensen*), the court stated: "[T]he encroachment must not be the result of defendant's willful act." (114 Cal.App.2d at p. 563.) We do not construe this statement to preclude balancing the equities when an intentional act results in an unintentional encroachment. Such a reading would virtually eliminate this doctrine's application, as all encroachment due to construction is the result of a willful act, regardless of whether the encroachment itself is intentional. (See *Hirshfield, supra*, 91 Cal.App.4th at p. 759 ["encroachment must not be willful or negligent"], p. 769 [whether a party "is willful [or] deliberate . . . in his or her trespass"].)

clarification or a specific finding of willfulness, and indeed prepared it. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134 (*Arceneaux*); see Code Civ. Proc., § 634.)[24]

The Association relies on the following findings by the trial court: Defendants were provided a copy of the CC&Rs and read them before or at the time they purchased the unit. In May 2001, Rabichev reviewed the CC&R provision requiring submission of written plans with respect to modifications requiring a building permit. The trial court "[found] it difficult to understand how . . . Rabichev could have believed that he was not required to submit plans and obtain approval from the Board for the work," as he is an architect and engineer, was familiar with condominium associations, as well as the specific approval requirement of these CC&Rs, and no one from the Board told him there was no approval requirement or that it had been waived or abrogated. "Further, . . . Rabichev, after reviewing the CC&Rs and the Map had to have known there was an issue regarding the Common Area." The trial court also found defendants' claim their realtor misled them could not support an estoppel, as they knew he was not on the Board or even a resident, and was not authorized to speak for the Association or the Board.

Construing these findings in accordance with the principles above, we are not persuaded that they require reversal. First, none of the trial court's findings indicate it believed Garbar acted willfully.[25] Second, assuming Rabichev's conduct was also properly before the trial court, these findings do not compel the conclusion that the trial court found willful encroachment. Although the trial court "[found] it difficult to understand how" Rabichev could have believed he was not required to submit plans and obtain Board approval, it stopped short of finding that he knowingly disregarded the approval requirement. Additionally, to the extent these findings may be reasonably construed to indicate that Rabichev must have known the CC&Rs contained an ambiguity as to the unit's

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[24] Defendants were the "prevailing party" (Code Civ. Proc. § 634), to the extent the trial court balanced the equities in denying the Association's request for injunctive relief.

[25] The only finding cited by the Association that arguably bears upon Garbar's intent is the trial court's finding that defendants' reliance on Wineman's representations could not support an estoppel defense.

upper boundaries, the Association has not established that his failure to clarify this ambiguity supports a finding of willful encroachment, much less that it compels one.

The trial court found: "[I]f there was any doubt about encroaching into the Common Area, Mr. Naganuma's statements to either . . . Rabichev or his workers that they could not go above the ceiling certainly put . . . Rabichev on notice that the area above the sheetrock ceiling was Common Area." To the extent the Association argues this finding suggests the trial court determined Rabichev knew the space above the ceiling was common area and encroached upon it nonetheless, substantial evidence does not support this assertion. Naganuma stated that he went to the unit "early during the demolition phase," "saw the workmen taking a part of the ceiling down," and told a worker "[Y]ou aren't supposed to be up there, because it's not part of the unit." He could not recall whether he spoke directly to Rabichev, a contractor, or one of the workers. To refresh Naganuma's recollection, counsel read from his deposition testimony indicating he "believe[d]" he told Rabichev the work violated the CC&Rs, but, when asked if this refreshed his recollection that he spoke to Rabichev, Naganuma responded: "It's possible that I did." Thus, Naganamu ultimately agreed only that "[i]t's possible" he warned Rabichev directly, and there is no evidence a worker told Rabichev of this warning.

At most, the trial court's findings may be read to indicate that it found defendants reasonably should have known Board approval of the project was required. But the cited portions of the trial court's ruling do not establish negligence unambiguously (*Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134), and the Association has waived the right to seek reversal based on negligent encroachment, in any event, by failing to do so in the trial court. (*Gonzalez*, *supra*, 122 Cal.App.4th at p. 1131.)[26]

The Association's reliance on *Morgan v. Veach* (1943) 59 Cal.App.2d 682, is misplaced. In that case, there was substantial evidence the defendant knew of a setback restriction early on and deliberately disregarded it. (*Id.* at pp. 688-689.) Additionally, the

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[26] We take judicial notice of the parties' trial briefs, which were not included in the record originally provided. (See Evid. Code, §§ 452, 459.)

court's discussion of the defendants' reliance on their real estate agent sounds in negligence, which the Association has forfeited the right to assert here.[27]

2. The Trial Court Acted Within Its Discretion in Balancing the Equities.

Second, the Association contends the trial court erred in denying its request for injunctive relief because "[u]ndisputed evidence established that removal of [defendants'] illegal ceiling is feasible . . . and the harm to the Association in refusing injunctive enforcement of its CC&RS is incommensurable." To the extent the Association has not waived this argument by failing to raise it at trial (*Gonzalez, supra,* 122 Cal.App.4th at p. 1131), we conclude the trial court acted within its discretion in finding the hardship to the Association from leaving the new ceilings in place was outweighed by the hardship caused defendants by their removal.

Nunnelee testified at trial that "significant demolition" would be required to lower the ceilings to their original height, including removal of "the entire bedroom floor," "the entire bathroom, all the fixtures, all the plumbing, all the floor, tile work," and the upper kitchen cabinetry, at a cost of over $263,000. In addition, defendants presented evidence they furred around the pipes, ducts and electrical work in the ceiling space, and there is no evidence the Association has used that space since the Tower's construction**.** We conclude, accordingly, that the trial court reasonably found disproportionate harm to defendants.

Clear Lake Riviera Community Association v. Cramer (2010) 182 Cal.App.4th 459, is distinguishable, as the trial court in that case found the defendant acted willfully, and no evidence was presented that the cost of correcting the violation would be disproportionate to the hardship to the Association. (*Id.* at pp. 465, 473.) The Association maintains, nonetheless, that the reviewing court's analysis demonstrates denying enforcement here

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[27] Citing *Woodbridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 Cal.App.4th 559, the Association also contends a trial court may not balance the equities in cases where homeowner associations seek to enjoin encroachments that violate the CC&Rs. (See *id*. at pp. 573-574 [distinguishing *Christensen* and *Hirshfield* because they did not involve an association's action to remove an encroachment that violated restrictive covenants].) The Association has waived this argument by failing to raise it below. We note, however, that the discussion in *Woodbridge* was unnecessary to the court's decision and therefore dicta. (*People v. Nguyen* (2000) 22 Cal.4th 872, 879.)

would cause it incommensurable harm. In context, we do not read the language on which the Association relies so broadly.[28]

Having concluded that the trial court did not abuse its discretion in denying the Association's request for injunctive relief,[29] we turn to defendants' contentions.

B. Defendants' Challenge to the Relief Fashioned by the Trial Court

Defendants contend the trial court erred in failing to recognize an encroachment easement under Article II, section 4 of the CC&Rs for "minor encroachments." They contend this provision "effectively prevents the Association from contesting minor appropriations of the Common Area unless the Association can show that the owner did not act in good faith." The trial court's statement of decision does not address defendants' claim to an easement under Article II, section 4 of the CC&Rs, and defendants did not object on the ground that the court failed to make such a finding. We therefore infer on appeal that the trial court decided this issue in the Association's favor. (Code Civ. Proc. § 634; *Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134.)

It is not clear how the easement established under Article II, section 4 of the CC&Rs differs from the relief ordered by the trial court in this case. (See *Hirshfield, supra,* 91 Cal.App.4th at pp. 764-765 [net effect of denying injunctive relief is a judicially-created easement].) We conclude, in any event, that the trial court reasonably could have found the encroachment is not minor, and therefore, that Article II, section 4 does not apply. Pockets of high ceiling encroach upon the common area by at least 1.5 feet in the living room area,

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[28] The Association argues that there was no evidence the cost of restoring the ceiling is substantial or that doing so would cause defendants financial hardship or inconvenience. Such evidence was unnecessary, as substantial evidence, including photographs of the completed ceiling and Nunnelee's testimony, reasonably support an inference of disproportionate harm to defendants.

[29] We do not consider the Association's remaining argument that *Lamden* requires "deference . . . to [its] selection of injunctive enforcement of the CC&Rs by removal of the violation." We deem this argument waived, as we see no indication that the Association asserted it below. (*Gonzalez*, *supra*, 122 Cal.App.4th at p. 1131.) In any event, the Association's discretion to pursue legal action is not at issue here.

reducing the space between the ceiling and the concrete slab above to 4 inches; and defendants raised the ceiling in the bathroom by at least 6 inches.

Defendants also contend it was an abuse of discretion to "effectively grant[] [the Association] a license to destroy [their] ceiling and any proximate area in their unit." The Association contends the trial court did not give it unlimited discretion to use the space above the ceiling in defendants' unit, relying on *Lamden* in arguing it must exercise its discretion reasonably, in good faith, and in the community's best interest. Defendants do not dispute that *Lamden* would impose a good faith reasonableness requirement; they contend, however, that this requirement does not protect them, as it is "fundamentally unfair" to require them to bear the expense of property damage even for a reasonable use of the common area space.

We do not construe the statement of decision to give the Association unlimited discretion to use the common area space now contained within defendants' unit. The trial court's language indicates that the Association may use this space only if it has a genuine need to do so in performing necessary maintenance and repairs or in adding utility or other installations. The statement of decision also does not immunize the Association from liability for damages to the unit, regardless of fault. It is clear the trial court intended to protect the Association from claims for damages that would not have arisen from its use of the common area space above the original ceilings had defendants not annexed that space by removing the ceilings. Properly construed, we find no error in the trial court's decision.[30]

V. The Attorney Fee Award[31]

The trial court deemed the Association "the prevailing party for all purposes, including as referenced in Civil Code § 1354" and granted its motion for attorney fees. (See Civ. Code, § 1354, subd. (c) ["In an action to enforce the governing documents, the

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30 The parties' anticipation of future conflicts over the use of the ceiling space does not alter our conclusion. (See *Hirshfield*, *supra*, 91 Cal.App.4th at p. 764 [to create an enforceable judgment, the court need not speculate that a party will not comply].)

31 Orders granting motions for attorney fees are appealable as special orders after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2); *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053.)

prevailing party shall be awarded reasonable attorney's fees and costs"].) The trial court concluded the Association's complaint "is clearly an action to enforce the governing documents," and that appellant's cross-complaint also constitutes such an action, as their causes of action "all stem from the Association's alleged failure to properly maintain or repair the mechanical room equipment."

Defendants challenge the attorney fee award on several grounds. We need not consider these contentions, as our decision reversing the trial court's order sustaining the demurrer to the cross-complaint also compels reversal of the attorney fee award, including the prevailing party determination, so that the trial court may reconsider these issues in light of our decision. (*Merced County Taxpayers' Ass'n v. Cardella* (1990) 218 Cal.App.3d 396, 402; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 220.) In the interest of judicial economy, however, we provide the following guidance to the trial court on remand:

The authority cited by defendants suggests that attorney fees under Civil Code section 1354, subdivision (c) are available only for causes of action that seek to enforce the governing documents. *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664 (*Salawy*) indicates that an "action" is distinguished by the rights and obligations it seeks to enforce, and that the term "action" may reasonably refer to a cause of action. (*Id.* at pp. 672-673 & fn. 6.)[32] The policy discussed in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds*) also supports this construction. Otherwise, a plaintiff could include a cause of action to which section 1354, subdivision (c) applies and recover attorney fees in connection with other claims that do not implicate rights or remedies under the CC&Rs and

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[32] In *Salawy*, the court stated: "Section 22 of the Code of Civil Procedure defines an 'action' as follows: 'An action is an ordinary proceeding . . . by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' Section 30 of the Code of Civil Procedure provides: 'A civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong.' " (121 Cal.App.4th at pp. 672-673.) *Salawy* also notes an alternative dictionary definition of "action" that includes "a right to sue" and states: " 'In this sense, *action* is also called a **cause of action**.' " (*Id.* at p. 673, fn. 6, emphasis original.)

do not give rise to a right to attorney fees. (*Reynolds*, at p. 129 ["Where a cause of action based on the contract . . . is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 only as they relate to the contract action"][33]; see Code Civ. Proc., § 1033.5, subd. (a)(10); *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1397 [prevailing party generally is not entitled to attorney fees unless authorized by agreement or statute].)

Defendants' cross-complaint illustrates this point. As we have explained above in reversing the trial court's decision on demurrer, defendants' third amended cross-complaint asserts four causes of action that arguably seek enforcement of defendants' rights to the performance of the Association's duties under the common law, rather than its duties under the CC&Rs. In their fifth cause of action, however, defendants seek to enforce their rights, and the Association's corresponding obligation, under the CC&Rs. The parties apply an all-or-nothing approach that turns on the "essence" or "essential character" of the cross-complaint. The flaw in these contentions is in their attempt to assign a common gravamen to causes of action that assert different rights and obligations—one that seeks to enforce the CC&Rs and four that do not.[34]

The Association's reliance on *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568 is misplaced. In that case, the court established the standard for determining the prevailing party (*id.* at p. 1574), but neither party contended the trial court was required to identify the causes of action to which Civil Code section 1354, subdivision (c) applied before making that determination. (See *In re Muszalski* (1975) 52 Cal.App.3d 500, 504 [a case is not authority for propositions neither considered nor discussed"].)

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[33] Civil Code section 1717 has no application here, but we find *Reynolds* instructive in interpreting section 1354, subdivision (c)'s reference to "an action to enforce the governing documents." Section 1717 applies "[i]n any action on a contract . . . ."

[34] *Kaplan v. Fairway Oaks Homeowners Assn.* (2002) 98 Cal.App.4th 715, 720-721 did not address whether section 1354 allowed attorney fees for all claims.

DISPOSITION

Paragraph 2a. of the judgment is modified to read: "The upper boundaries of Unit No. 24-D, described immediately above, are located approximately 8 feet, 7 inches above the floor of said Unit No. 24-D, in the areas referred to as ceiling 'A' on the above-referenced Map of Cathedral Hill Tower, and approximately 7.5 feet above the floor of said Unit No. 24-D, in the areas referred to as Ceiling 'B' on the above-referenced Map of Cathedral Hill Tower[.]" The judgment is reversed as it relates to the order dismissing the third amended cross-complaint and the prevailing party determination but is otherwise affirmed as modified. The attorney fee award also is reversed. The parties shall bear their own costs on appeal.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.